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## The Talent Agencies Act: A Call for Reform - Topic: Marathon Entertainment, Inc. v. Blasi

Tracie Parry-Bowers

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# NOTE: THE TALENT AGENCIES ACT: A CALL FOR REFORM.

## TOPIC: MARATHON ENTERTAINMENT, INC. V. BLASI

### I. INTRODUCTION

The policy behind the Talent Agencies Act<sup>1</sup> (TAA or the Act) is to protect artists from abuse at the hands of agencies.<sup>2</sup> However, it has been applied by both the courts and the Labor Commissioner to invalidate entire personal manager contracts where personal managers procure *any* employment for the artist in violation of the Act.<sup>3</sup> Essentially, artists have been allowed to use the TAA as a sword to sever obligations they have incurred on the road to success.<sup>4</sup> During the summer of 2006, in *Marathon Entertainment, Inc. v. Blasi*, a California appellate court held that the trial court and the Labor Commissioner must first consider whether the illegal portions of a contract can be severed before voiding an entire agreement.<sup>5</sup> This decision was a radical departure from twenty-eight years of jurisprudence in this field.<sup>6</sup> On September 20, 2006, the California Supreme Court granted review and depublished the opinion.<sup>7</sup>

This Note will consider the implications of the *Marathon* decision.

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1. CAL. LAB. CODE §§ 1700–1700.47 (Deering 2006).

2. See *Waisbren v. Peppercorn Prod.*, 41 Cal. App. 4th 246, 254 (Ct. App. 1995).

3. See *generally id.* (explaining history and application of the TAA).

4. See *Stroman v. New Wave Entm't*, TAC 38-05, at 6 (July 11, 2006), *available at* <http://www.dir.ca.gov/dlse/TAC/38-05.pdf>; *Behr v. Marv Dauer & Assoc.*, TAC 21-00, at 13 (Aug. 16, 2001), *available at* <http://www.dir.ca.gov/dlse/TAC/21-00.pdf>; *Kilcher v. Vainshtein*, TAC 02-99, at 28 (May 30, 2001), *available at* <http://www.dir.ca.gov/dlse/TAC/02-99.pdf>; *Church v. Brown*, TAC 52-92, at 14 (June 2, 1994), *available at* <http://www.dir.ca.gov/dlse/TAC/52-92.pdf>. See also Opening Brief of Respondent at 35–36, *Marathon Entm't, Inc. v. Blasi*, No. S145428 (Cal. Oct. 30, 2006) (providing an extensive list of instances in which the Labor Commission has invalidated entire contracts for any violations of the Act).

5. *Marathon Entm't, Inc. v. Blasi*, 140 Cal. App. 4th 1001, 1012 (Ct. App. 2006), *petition for review granted*, 2006 LEXIS 11453 (Cal. Sept. 20, 2006) (No. S145428), *depublished by*, 49 Cal. Rptr. 3d 656, LEXIS 11453 (Cal., 2006).

6. Dave McNary, *Court Favors Managers*, DAILY VARIETY, June 26, 2006, at 14.

7. *Marathon*, 140 Cal. App. 4th 1001.

Part II will examine the background of relevant law, namely the Talent Agencies Act and the Doctrine of Severability. Part II will also address California case law interpreting these two areas. Part III will outline the facts and procedural history of *Marathon Entertainment, Inc. v. Blasi*. This landmark decision is a step in the direction of fairness for managers who are trying to collect commissions on legally procured employment. However, even if the Supreme Court of California decides to affirm the decision, it will not be the end of the controversy over the TAA and the regulation of personal managers. Part IV will discuss both the possibility of reversal of the *Marathon* decision and the reasons why the controversy will continue regardless. Part V will assert that the California legislature should create a commission to re-examine the TAA. The Act should then be amended to include an incidental procurement exception, as well as criminal penalties for violations that are *not* incidental to a manager's job duties. This would allow managers the freedom to promote their clients without fear of potential contract invalidation, while still providing them adequate incentive to comply with the Act. The courts and the Labor Commissioner would be free to apply the Act as it was intended, to protect artists from potential abuse at the hands of agencies.<sup>8</sup> Finally, Part VI will conclude that not only would revamping the Act address the issue in this particular situation, but that such changes are needed to assuage other controversies in the field of agent/manager regulation.

## II. BACKGROUND: THE TALENT AGENCIES ACT AND THE DOCTRINE OF SEVERABILITY

### A. *The Talent Agencies Act: California Labor Code §§ 1700–1700.47*

California began requiring licenses for employment agencies in 1913 when the Legislature passed the Private Employment Agencies Law.<sup>9</sup> This legislation distinguished theatrical employment agencies from general employment agencies and provided for additional regulation for theatrical agents.<sup>10</sup> In 1937, the state enacted its Labor Code,<sup>11</sup> and attempted to further protect the rights of artists in the entertainment industry by

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8. See *Waisbren*, 41 Cal. App. 4th at 254.

9. Chip Robertson, *Don't Bite the Hand that Feeds: A Call for a Return to an Equitable Talent Agencies Act Standard*, 20 HASTINGS COMM. ENT. L.J. 223, 228 (1997).

10. Neville L. Johnson & Daniel Webb Lang, *The Personal Manager in the California Entertainment Industry*, 52 S. CAL. L. REV. 375, 383–84 (1979).

11. REP. OF THE CAL. ENT. COMM'N, at 35 (1985).

incorporating the Artist Managers Law (AML).<sup>12</sup> Accordingly, the Code incorporated much of the 1913 legislation, but established “motion picture agencies” as separate from “theatrical agencies.”<sup>13</sup> In 1943, the Legislature attempted to extend these protections even further by passing the Artist Managers Act (AMA).<sup>14</sup> In addition to the general employment agency, the theatrical agency, and the motion picture agency, the AMA recognized a new category of agency: the artist manager.<sup>15</sup> The AMA even codified some of the “duties now associated with contemporary managers and agents.”<sup>16</sup> Specifically, it defined an artist manager as someone “who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their professional careers” in addition to procuring employment or engagements for their clients.<sup>17</sup> Thus, the AMA reflected a growing and changing entertainment industry, and an attempt to create regulatory categories “that, in the aggregate, recognized the varying needs of artists within different niche areas” of that industry.<sup>18</sup>

However, the industry was growing rapidly, and the roles of managers and agents were becoming increasingly separate.<sup>19</sup> As talent agencies grew larger, talent agents focused on procuring employment rather than developing careers.<sup>20</sup> As a result, managers stepped in to fill that void.<sup>21</sup> Due to these developments, the regulatory categories in the AMA soon became outdated and unworkable.<sup>22</sup> Case law began to reflect confusion

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12. Robertson, *supra* note 9, at 228; see also Johnson & Lang, *supra* note 10, at 388–89 (1979) (explaining the use of the term “artists’ manager”: “The ‘talent agent’ of the Talent Agencies Act is the immediate successor to the ‘artists’ manager.’ Under the Artists’ Managers Act, an ‘artists’ manager’ is one who engages in the ‘occupation of advising, counseling, or directing artists in the development or advancement of their professional careers and who procures, offers, promises or attempts to procure employment or engagements for an artist.’”).

13. REP. OF THE CAL. ENT. COMM’N, at 35 (1985).

14. Gary E. Devlin, *The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California’s Entertainment Industry*, 28 PEPP. L. REV. 381, 387 (2001).

15. REP. OF THE CAL. ENT. COMM’N, at 36 (1985).

16. Devlin, *supra* note 14, at 387.

17. REP. OF THE CAL. ENT. COMM’N, at 36 (1985).

18. Devlin, *supra* note 14, at 387.

19. *Id.*

20. *Id.*; see also Park v. Deftones, 71 Cal. App. 4th 1465, 1469–70 (Ct. App. 1999) (explaining that personal managers “primarily advise, counsel, direct and coordinate the development of the artist’s career. They advise in both business and personal matters, frequently lend money to young artists, and serve as spokespersons for the artists.”).

21. Devlin, *supra* note 14, at 387; see also Park, 71 Cal. App. 4th at 1469–70 (explaining that personal managers “primarily advise, counsel, direct and coordinate the development of the artist’s career. They advise in both business and personal matters, frequently lend money to young artists, and serve as spokespersons for the artists.”).

22. Devlin, *supra* note 14, at 387.

over “which specific activities and classes of people in the entertainment industry were regulated under the [AMA].”<sup>23</sup> In 1967, the Legislature attempted to clarify the law by repealing the motion picture agency and theatrical agency categories.<sup>24</sup> However, the case law continued to reflect the confusion, and in 1978, the Talent Agencies Act was born.<sup>25</sup>

Essentially, the Act “imposes duties and obligations on talent agencies that represent performing artists.”<sup>26</sup> The Legislature’s stated intent was to “regulate those individuals whose primary purpose and function is the procurement of employment for the artist.”<sup>27</sup> The Act defines a talent agency as “a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists.”<sup>28</sup> It requires all talent agents to be licensed,<sup>29</sup> to pay licensing fees,<sup>30</sup> to submit all contracts to the Labor Commissioner for approval,<sup>31</sup> to maintain proper records,<sup>32</sup> and to generally “refrain from engaging in . . . prohibited conduct.”<sup>33</sup> The Labor Commission has original jurisdiction over all controversies arising under the Act, and the Act also guarantees the right to appeal *de novo* to the superior court.<sup>34</sup>

The part of the Act that mandates licensing has become the primary focus of ongoing controversy: “[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefore from the Labor Commissioner.”<sup>35</sup> As discussed in the next section, this

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23. Robertson, *supra* note 9, at 230 (summarizing *Raden v. Laurie*, 120 Cal. App. 2d 778 (Ct. App. 1953), in which the court held that an “unlicensed personal manager’s activities in seeking employment will trigger the licensing requirements of the Act only if the ‘contract were [found to be] a mere sham and subterfuge designed . . . to misrepresent and conceal the true agreement of the parties and to evade the law,’ but did not establish “whether ‘one not licensed as an artist’ manager [may] engage in the procurement of employment,” and “appeared to provide for some allowable unlicensed procurement activity, as long as the activity did not result from contractual ‘fraud or pretext’”).

24. REP. OF THE CAL. ENT. COMM’N, at 36 (1985).

25. See Robertson, *supra* note 9, at 231–3 (discussing *Buchwald v. Superior Court*, 254 Cal. App. 2d 347 (Ct. App. 1967), in which Matthew Katz, personal manager to the band Jefferson Airplane, had to return commissions for violating the Act).

26. WITKIN SUMMARY OF CALIFORNIA LAW § 449 at 547 (B.E. Witkin, ed., 10th ed. 2005).

27. Robertson, *supra* note 9, at 233.

28. CAL. LAB. CODE § 1700.4(a) (Deering 2006).

29. *Id.* § 1700.5.

30. *Id.* § 1700.12.

31. *Id.* § 1700.23.

32. *Id.* § 1700.26.

33. WITKIN SUMMARY OF CALIFORNIA LAW § 449 at 548 (B.E. Witkin, ed., 10th ed. 2005).

34. CAL. LAB. CODE § 1700.44 (Deering 2006).

35. *Id.* § 1700.5.

provision has been the focus of much litigation and confusion, and from the outset, was construed harshly against personal managers.<sup>36</sup> In 1982, the Legislature responded to some of the problems by amending the Act.<sup>37</sup> These amendments allow unlicensed persons to negotiate contracts in conjunction with a licensed agent and to procure recording contracts for artists.<sup>38</sup> At the same time, the Legislature created the ten-member California Entertainment Commission<sup>39</sup> (CEC) in order to:

study the laws and practices of this state, the State of New York, and other entertainment capitals of the United States relating to the licensing of agents and representatives of artists in the entertainment industry in general . . . so as to enable the commission to recommend to the Legislature a model bill regarding this licensing.<sup>40</sup>

The Commission concluded that no one, including personal managers, should be “allowed to procure employment for an artist without being licensed as a talent agent, except in accordance with the present provisions of the Act.”<sup>41</sup> Thus, while the Legislature adopted some changes to the Act in 1986,<sup>42</sup> it decided against an express incidental procurement exception.<sup>43</sup>

1. Interpretive Case Law: *Waisbren v. Peppercorn Productions, Inc.*, *Park v. Deftones*, and *Styne v. Stevens*

These three seminal cases can be used to sum up the California courts’ current approach to cases involving regulation of personal managers under the TAA. In *Waisbren v. Peppercorn Productions, Inc.*, the court upheld summary judgment against Waisbren, a personal manager trying to recoup money he alleged he was owed pursuant to a six-year contract with Peppercorn Productions.<sup>44</sup> The court acknowledged that Waisbren

36. Devlin, *supra* note 14, at 388–89 (discussing two early disputes, *Derek v. Callan*, Cal. Labor Comm’n No. TAC 18-80 (1982) and *Pryor v. Franklin*, Cal. Labor Comm’n No. TAC 17 MP 114 (1982), in which “personal managers were forced to forfeit their lucrative contractual relationships with artists due to incidental procurement activities in violation of the TAA.”).

37. REP. OF THE CAL. ENT. COMM’N, at 37 (1985).

38. *Id.* at 39 (1985); CAL. LAB. CODE § 1700.4(a); CAL. LAB. CODE § 1700.44(d).

39. REP. OF THE CAL. ENT. COMM’N, at 1, 39 (1985).

40. *Id.* at 3 (1985) (within unnumbered footnote); see also Opening Brief for Appellant at 28–9, *Marathon v. Blasi*, No. S145428 (Oct. 20, 2006) (noting that the members of the CEC were the Labor Commissioner, three talent agents, three personal managers, and three artists, “hardly a level playing field to find fair for the managers”).

41. REP. OF THE CAL. ENT. COMM’N, at 6 (1985).

42. *Park v. Deftones*, 71 Cal. App. 4th 1465, 1472 (Ct. App. 1999).

43. *Waisbren v. Peppercorn Prod.*, 41 Cal. App. 4th 246, 258 (Ct. App. 1995).

44. *Id.* at 250.

provided many valuable services to Peppercorn, and that his procurement of employment was merely incidental to those duties.<sup>45</sup> However, the court held that even though managers are not mentioned in the Act, if a manager incidentally procures or solicits employment, he must comply with the Act's licensing requirement.<sup>46</sup> In doing so, the court looked to the remedial purpose of the Act, the Labor Commissioner's interpretation of the Act, legislative history, and prior judicial construction.<sup>47</sup>

With regards to the remedial purpose of the Act, the court noted that it is "designed to correct abuses that have long been recognized," and to protect "the personal, professional, and financial welfare of artists" by strictly regulating talent agency conduct.<sup>48</sup> The court emphasized that the Act should be liberally construed in furtherance of that objective.<sup>49</sup> Next, the court noted that great weight must be given to "the construction of a statute by an agency charged with its administration."<sup>50</sup> Hence, the Labor Commissioner's rejection of an incidental procurement exception is given deference.<sup>51</sup> The court also considered, in some detail, the legislative history of the Act, focusing on the 1982 CEC.<sup>52</sup> It concluded that the main reason for the creation of the CEC was to consider whether personal managers should be able to procure employment for an artist.<sup>53</sup> The court also deferred to the CEC's conclusion that no one should be able to procure employment without a license, and determined that that the Legislature had accepted this by declining to adopt an exception for managers.<sup>54</sup>

Finally, the court distinguished a recent appellate court decision, *Wachs v. Curry*, that had interpreted the Act as requiring a person's procurement activities to constitute a significant part of his business before requiring regulation.<sup>55</sup> In that case, Arsenio Hall filed a petition with the

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45. *Id.* at 252.

46. *Id.* at 250.

47. *Id.* at 254-61.

48. *Id.* at 254.

49. *Waisbren*, 41 Cal. App. 4th at 254.

50. *Id.* at 255.

51. *Id.* at 254-261.

52. *Id.* at 256.

53. *Id.* at 256-57 (explaining that the CEC Report "phrased the first issue to be addressed as follows: 'Under what conditions or circumstances, if any, should personal managers or anyone other than a licensed talent agent be allowed to procure employment for an artist without being licensed as a talent agent?,'" and that "[t]he Report acknowledged that '[t]he principal, and philosophically the most difficult, issue before the Commission, the discussion of which consumed a substantial portion of the time of most of the meetings of the Commission was this first issue.'").

54. *Id.* at 258-59.

55. *Waisbren*, 41 Cal. App. 4th at 261.

Labor Commission requesting that Wachs, Hall's personal manager, be compelled to return all monies collected from Hall due to alleged violations of the Act.<sup>56</sup> Wachs responded by filing suit in state court against the Labor Commissioner and others in charge of enforcing the Act, challenging the Act's constitutionality.<sup>57</sup> The *Wachs* court held that the Act was facially constitutional,<sup>58</sup> but also concluded that:

from the Act's obvious purpose to protect artists seeking employment and from its legislative history, the "occupation" of procuring employment was intended to be determined according to a standard that measures the significance of the agent's employment procurement function compared to the agent's counseling function taken as a whole. If the agent's employment procurement function constitutes a significant part of the agent's business as a whole then he or she is subject to the licensing requirement of the Act even if, with respect to a particular client, procurement of employment was only an incidental part of the agent's overall duties. On the other hand, if counseling and directing the clients' careers constitutes the significant part of the agent's business then he or she is not subject to the licensing requirement of the Act, even if, with respect to a particular client, counseling and directing the client's career was only an incidental part of the agent's overall duties. What constitutes a "significant part" of the agent's business is an element of degree we need not decide in this case.<sup>59</sup>

The *Waisbren* court dismissed this idea as dicta, and thus sounded the death knell for any "significant part," or incidental procurement exception.<sup>60</sup> The *Waisbren* court also regarded the fact that the *Wachs* court did not consider the remedial purpose of the Act, the Labor Commissioner's interpretation of the Act, or the legislative history of the Act, to be error.<sup>61</sup> In conclusion, the court noted that it simply refused to believe that the Legislature intended to exempt personal managers from the Act "unless his procurement efforts cross some nebulous threshold from 'incidental' to 'principal.'" Such a standard is so vague as to be unworkable."<sup>62</sup> The Labor Commission officially adopted the *Waisbren*

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56. *Wachs v. Curry*, 13 Cal. App. 4th 616, 620 (Ct. App. 1993).

57. *Id.* at 620–21.

58. *Id.* at 629.

59. *Id.* at 628.

60. *Waisbren v. Peppercorn Prod.*, 41 Cal. App. 4th 246, 261 (Ct. App. 1995).

61. *Id.*

62. *Id.* at 255.



standard, as that decision comported with its own long-standing interpretation that there can be no exception for incidental procurement.<sup>63</sup>

In *Park v. Deftones*, the California appellate court solidified its *Waisbren* stance and continued the trend of construing the TAA harshly against personal managers.<sup>64</sup> The *Deftones* court granted summary judgment to the defendant band on the grounds that the band's contract with its long-time manager, Dave Park, was void due to violations of the TAA.<sup>65</sup> It is important to note that Park never received nor requested compensation for the engagements that were booked in violation of the Act.<sup>66</sup> In the course of his duties, Park had booked quite a few shows for the band.<sup>67</sup> However, it was only after procuring a recording contract for the band, for which there is an exception in the TAA,<sup>68</sup> that the Deftones sought to have the Labor Commissioner void the agreement.<sup>69</sup> The court held that incidental activity in procuring employment is subject to regulation under the Act, even if no commission is collected for the services.<sup>70</sup>

The *Styne v. Stevens* decision delineated just how far the Labor Commissioner's jurisdiction extends in these cases. Styne, a personal manager, sought payment on commissions he alleged were due under an oral contract with Connie Stevens.<sup>71</sup> Stevens' defense was that Styne had violated the Act and the contract was thus void.<sup>72</sup> The trial court denied summary judgment on these grounds, "reasoning that Styne's activities on Stevens's behalf were not of a kind governed by the Act."<sup>73</sup> The court then refused her "request for a jury instruction presenting her Act-based defense."<sup>74</sup> The jury initially returned a verdict for Styne.<sup>75</sup> However, the trial court granted Stevens' request for a new trial, finding that it had erred in refusing her request for a jury instruction about the requirements of the

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63. See Robertson, *supra* note 9, at 224–25 (explaining that the California Labor Commission opted to enforce the *Waisbren* standard over *Wachs v. Curry*).

64. See generally *Park v. Deftones*, 71 Cal. App. 4th 1465 (Ct. App. 1999).

65. *Park v. Deftones*, 71 Cal. App. 4th 1465, 1467–68 (Ct. App. 1999).

66. See *id.* at 1468.

67. *Id.*

68. CAL. LAB. CODE § 1700.4 (Deering 2006).

69. *Park*, 71 Cal. App. 4th at 1468.

70. *Id.* at 1472.

71. *Styne v. Stevens*, 26 Cal. 4th 42, 48 (2001).

72. *Id.* at 47.

73. *Id.*

74. *Id.*

75. *Id.*

Act.<sup>76</sup> Reflecting the case law confusion that has accompanied the Act in all its incarnations, the verdict was then reinstated by the appellate court, which found that her Act-based defense was barred because she had not invoked it within one year of being served with *Styne's* complaint.<sup>77</sup> Finally, the California Supreme Court granted certiorari to resolve the confusion.<sup>78</sup> The final verdict was that the Labor Commissioner has original and exclusive jurisdiction over all matters arising under the Act, that "reference of disputes involving the [A]ct to the commissioner is *mandatory*," and that "all remedies before the Commissioner *must* be exhausted before the parties can proceed to the superior court."<sup>79</sup> The court also held that the one-year statute of limitations does not bar use of the Act as a defense.<sup>80</sup> Even if asserted as a defense with no claim for affirmative relief, the superior court proceedings must be stayed and a petition must be filed before the commissioner.<sup>81</sup>

Together, the aforementioned case law provides a framework of rules within which the courts operate to regulate personal managers under the TAA. First, the *Styne* decision makes it clear that the Labor Commissioner has original jurisdiction over *all* controversies under the Act.<sup>82</sup> This means that, although a petitioner is guaranteed review by the superior court, all issues related to the act must first be heard by the Commissioner, even if said issues arise only as a defense in a Superior Court action. Ultimately, this means that the Labor Commission will, in reality, apply any standard adopted by the court and continue its tendency towards total contract invalidation.<sup>83</sup> Second, the *Waisbren* decision dictates that there is no

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76. *Id.*

77. *Styne*, 26 Cal. 4th at 47.

78. See generally *id.*

79. *Id.* at 54 (quoting REO Broadcasting Consultants v. Martin, 69 Cal. App. 4th 489, 494–95 (1999) (italics in original)).

80. *Id.* at 51.

81. *Id.* at 56–59.

82. *Id.* at 56.

83. See *Stroman v. New Wave Entm't*, TAC 38-05 (July 11, 2005), available at <http://www.dir.ca.gov/dlse/TAC/38-05.pdf>; *Behr v. Marv Dauer & Assoc.*, TAC 21-00 (Aug. 16, 2001), available at <http://www.dir.ca.gov/dlse/TAC/21-00.pdf>; *Kilcher v. Vainshtein*, TAC 02-99 (May 30, 2001), available at <http://www.dir.ca.gov/dlse/TAC/02-99.pdf>; *Church v. Brown*, TAC 52-92, at 14 (June 2, 1994), available at <http://www.dir.ca.gov/dlse/TAC/52-92.pdf>. See also Opening Brief of Respondent at 35–36, *Marathon Entm't, Inc. v. Blasi*, No. S145428 (Oct. 30, 2006) (providing an extensive list of instances in which the Labor Commission has invalidated entire contracts for any violations of the Act). *Contra* *Cuomo v. Atlas Entm't*, TAC 21-01, available at <http://www.dir.ca.gov/dlse/TAC/21-01.pdf> (holding that the manager in question should not have to disgorge any amounts prior to the date of the violation); *Anderson v. D'Avola*, TAC 63-93, available at <http://www.dir.ca.gov/dlse/TAC/63-93.pdf> (voiding only one out of four contracts in contention); Opening Brief for Appellant at 13–18, *Marathon Entm't, Inc. v. Blasi*,

incidental procurement exception for personal managers.<sup>84</sup> This decision also highlights the extreme judicial deference to legislative history and to the Labor Commissioner's decisions.<sup>85</sup> However, the court's dismissal of the *Wachs* reasoning showcases the difficulties the courts have had in applying the Act.<sup>86</sup> Finally, the *Deftones* decision delineates the extent to which the *Waisbren* standard will be applied: a contract can be invalidated for violations of the Act even if no payment was requested or received for the violations.<sup>87</sup>

### B. The Doctrine of Severability

The Restatement Second of Contracts avoids ever using the term "severability," for fear of "wrongly suggesting that an agreement itself can be characterized as . . . 'severable' for all purposes and in any circumstances."<sup>88</sup> However, it provides a straightforward definition of the doctrine in § 183: if the parties' performances can be apportioned "into corresponding pairs of part performances" so that the parts of each pair are properly regarded as equivalents and one pair is not offensive to public policy, that portion of the agreement is enforceable by a party who did not engage in serious misconduct.<sup>89</sup>

To apply this definition to a simple set of facts, imagine a situation in which a personal manager has procured a recording contract for his client, as allowed by the TAA. Imagine though, that the personal manager has also violated the TAA by booking a single performance engagement for the artist. In very simple terms, this means that if violating the TAA is not considered "serious misconduct,"—(and of course, this is the real issue here to be discussed later)—then those corresponding pairs of part performance that do not violate the TAA are enforceable.<sup>90</sup> An example of an enforceable pair of part performance would be the artist's agreement to pay the manager a commission in exchange for procurement of a record contract.

However, there is no easy formula or bright line rule to determine

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No. S145428 (Cal. Oct. 20, 2006) (providing examples and summaries of instances in which the Labor Commission has incorporated severance into its decisions).

84. *Waisbren v. Peppercorn Prod., Inc.*, 41 Cal. App. 4th 246, 259 (Ct. App. 1995).

85. *Id.* at 254–61.

86. *Id.* at 261.

87. *Park v. Deftones*, 71 Cal. App. 4th 1465, 1472 (Ct. App. 1999).

88. RESTATEMENT (SECOND) OF CONTRACTS § 183 (1981).

89. *Id.*

90. *Id.*

which contracts may be severable.<sup>91</sup> The most important factor, though, is the intent of the parties.<sup>92</sup> Intent is determined by the “terms and provisions of the contract,” the subject matter of the contract, and “the circumstances of the particular transaction.”<sup>93</sup> If the intent of the parties is not clear, the courts will generally look to the interdependence of the parts of the contract and the nature of the consideration.<sup>94</sup> If the parts of the contract are not so “interdependent or interwoven that the parties must be deemed to have contracted only with a view to the performance of both, and would not have entered into one without the other,” then the contract will be severable.<sup>95</sup> Put another way, a contract can be severable if the illegal term is not an essential part of the agreement and if the parties would have entered into the agreement even without the offending, illegal term.<sup>96</sup> Likewise, if the consideration for the parts is “divisible and separable so as to be capable of apportionment” without harming the contract or creating the need for a new contract, the agreement will also be severable.<sup>97</sup> When possible, severing illegal provisions so that a contract can be enforced comports “with the law’s overriding policy in favor of enforcing agreements.”<sup>98</sup>

California codified the doctrine of severability into its Civil Code in 1872, summarizing it even more succinctly than the Restatements: “Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest.”<sup>99</sup> Of course, as applied it is not quite so simple, necessitating an examination of the case law interpreting the code.

### 1. Interpretive Case Law

The doctrine is well-entrenched in the California courts’ decisions and supports the general principle that in contracts, both law and equity disfavor forfeiture.<sup>100</sup> *Marathon Entertainment, Inc. v. Blasi* sums up many of the fundamental principles the court follows when applying the

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91. 17 AM. JUR. 2D *Contracts* § 406 (2006).

92. *Id.*

93. *Id.*

94. See 73 AM. JUR. 2D *Statute of Frauds* § 436 (2006).

95. *Id.*

96. Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 47–48 (1995).

97. 73 AM. JUR. 2D *Statute of Frauds* § 436 (2006).

98. Movsesian, *supra* note 96, at 47.

99. CAL. CIV. CODE § 1599 (Deering 2006).

100. *People v. Far West Ins. Co.*, 93 Cal. App. 4th 791, 795 (Ct. App. 2001).

doctrine.<sup>101</sup> First and foremost, “[t]he overarching consideration in determining whether to allow a severance of an agreement is whether the interests of justice would be furthered by severing the agreement.”<sup>102</sup> To determine this:

[t]he courts must consider the main objective of the parties’ agreement. If the illegality is collateral to and severable from the main purpose of the contract, then severance is appropriate. If, however, the taint of illegality so permeates the entire agreement that it cannot be removed by severance or restriction but only by reformation or augmentation, the courts must invalidate the entire agreement.<sup>103</sup>

Finally, courts are more likely to grant a severance if separating the legal and illegal parts of the agreement would “conserve a contractual relationship [without] condoning an illegal scheme”, and “prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement—particularly when there has been full or partial performance of the contract.”<sup>104</sup> The California courts have even held that contracts made in violation of public policy may be severed if it is appropriate to do so.<sup>105</sup>

### III. MARATHON ENTERTAINMENT, INC. V. BLASI

#### A. *The Facts and Procedural History*

In December 1998, Marathon Entertainment and Rosa Blasi entered

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101. *Marathon Entm’t, Inc. v. Blasi*, 140 Cal. App. 4th 1001, 1010–11 (Ct. App. 2006), *petition for review granted*, 2006 LEXIS 11453 (Cal. Sept. 20, 2006) (No. S145428) (citation omitted). See generally WITKIN SUMMARY OF CALIFORNIA LAW § 330 at 363–65 (B.E. Witkin, ed., 10th ed. 2006) (using many of the same cases to explain the severability of unconscionable provisions).

102. *Marathon*, 140 Cal. App. 4th at 1010 (citing *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1074 (Cal. 2003) (holding that an unconscionable arbitration clause could be severed because it was the only illegal provision in the agreement and could be removed without changing the nature of the contract as a whole)).

103. *Id.* (citing *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 659 (Ct. App. 2004) (holding that a cost-sharing provision of an arbitration agreement was not severable)).

104. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 123–24 (2000) (holding that an arbitration agreement could not be severed where a lack of mutuality permeated the agreement and was thus tainted with illegality).

105. *Whorton v. Dillingham*, 202 Cal. App. 3d 447, 453 (Ct. App. 1988) (holding that the possibility of severance existed where the agreement rested partially on illegal consideration (a sexual relationship), and partially on legal consideration (chauffeur, bodyguard, secretarial and real estate counseling services)).

into an oral contract.<sup>106</sup> Marathon was to serve as Blasi's personal management, and Blasi was to pay Marathon a fifteen percent commission on all entertainment employment income.<sup>107</sup> Blasi failed to pay Marathon the commission from her employment contract with the television series "Strong Medicine" (Blasi allegedly reduced Marathon's commission percentage to ten percent and then stopped payment altogether).<sup>108</sup> In the fall of 2001, she terminated the oral contract and told Marathon that her talent agent would now act as her personal manager.<sup>109</sup> Blasi was represented by a licensed talent agent at all times during the term of the Marathon contract.<sup>110</sup>

Marathon filed an "action against Blasi for breach of oral contract, quantum meruit, false promise and unfair business practices" in February of 2003.<sup>111</sup> Blasi obtained a stay from the court, and then initiated a Labor Commission proceeding alleging that Marathon had "been performing unlawful activities as unlicensed talent agents by seeking and attempting to procure, or procuring employment . . . without being licensed to do so and in violation of the Talent Agencies Act."<sup>112</sup> The Commissioner invalidated the entire contract as illegal for unlicensed talent agency services in violation of the Act.<sup>113</sup>

Marathon appealed the Labor Commissioner's decision to the Superior Court for a *de novo* trial.<sup>114</sup> Blasi then moved for summary judgment, which the court granted, affirming the Labor Commissioner's invalidation of the contract.<sup>115</sup>

On appeal from this decision, the court looked to the doctrine of severability as codified in Section 1599 of the California Civil Code.<sup>116</sup> The court found as follows:

The fact that a personal manager must comply with the Act's licensing requirements before engaging in the regulated activities of a talent agency does not necessarily mean, however,

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106. *Marathon Entm't, Inc. v. Blasi*, 140 Cal. App. 4th 1001, 1006 (Ct. App. 2006), *petition for review granted*, 2006 LEXIS 11453 (Cal. Sept. 20, 2006) (No. S145428).

107. *Id.* at 1005.

108. *Id.* at 1006.

109. *Id.*

110. *Id.* at 1005.

111. *Id.* at 1006.

112. Opening Brief for Appellant at 14, *Marathon Entm't, Inc. v. Blasi*, No. S145428 (Oct. 20, 2006).

113. *Marathon*, 140 Cal. App. 4th at 1007.

114. *Id.*

115. *Id.* at 1007-08.

116. *Id.* at 1010.

that a contract for personal manager services must be *completely* invalidated if the personal manager commits even a single violation of the Act.<sup>117</sup>

Blasi argued that if the court held that personal managers who violate the Act are allowed to collect compensation from lawfully procured employment, it would “destroy the managers’ incentive to comply with the Act.”<sup>118</sup> The court addressed a brief paragraph to this issue, finding that barring recovery on illegal contracts is “ample financial incentive to comply with the Act.”<sup>119</sup> Finally, because the court found that there were triable issues of material fact as to the severability of the contract, it reversed the trial court’s decision.<sup>120</sup>

### *B. Case Law Cited by the California Appellate Court in Marathon*

In reversing the Superior Court’s decision, the court reviewed a wealth of cases interpreting the doctrine of severability, many of which are addressed in Part II of this Note.<sup>121</sup> In particular, the court directed its focus to those cases involving violations of business licensing statutes. The court found that the fact pattern in *Birbrower v. Superior Court* could be likened to the Marathon/Blasi situation, and that the decision in *Birbrower* supported Marathon’s position.<sup>122</sup> In *Birbrower*, a New York law firm provided services to a California client both in California (in violation of Section 6125 of the California Business and Professions Code), and in New York.<sup>123</sup> The California Supreme Court held that the firm may be able to collect its New York fees under the doctrine of severability, as long as the illegal portions of the agreement (those relating to the practice of law in California) could be separated from the legal ones (those relating to practice in New York).<sup>124</sup> Thus, the court reversed the appellate court’s decision to void the entire attorney fee agreement and invalidated only the part of the fee agreement relating to the services provided in violation of

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117. *Id.* at 1008.

118. *Id.* at 1012.

119. *Marathon*, 140 Cal. App. 4th at 1012.

120. *Id.* at 1009.

121. See *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1074–75 (2003); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 123–24 (2000); *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 659 (2004); *Whorton v. Dillingham*, 202 Cal. App. 3d 447, 452–53 (1988).

122. *Marathon*, 140 Cal. App. 4th at 1005.

123. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 126 (1998).

124. *Id.* at 140.

the California statute.<sup>125</sup>

The *Marathon* court also stressed that “[b]oth equity and law disfavor forfeiture” and cited several other cases in support of the proposition that contracts made in violation of a business licensing statute are not automatically unenforceable.<sup>126</sup> For example in 1957, the California Supreme Court held in *Lewis & Queen v. N.M. Ball Sons* “that in determining whether to enforce a contract made in violation of a business licensing statute, courts must consider whether ‘the forfeiture resulting from unenforceability is disproportionately harsh considering the nature of the illegality.’”<sup>127</sup> Perhaps most prescient to cases involving actors attempting to escape from personal manager contracts, in 1946 the California Supreme Court warned in *Gatti v. Highland Park Builders* that “courts must be wary of transforming a protective licensing scheme intended for the public safety into ‘an unwarranted shield for the avoidance of a just obligation.’”<sup>128</sup> Reaching even further back into its history of interpreting contracts made in violation of licensing statutes, the court also cited *Wood v. Krepps*.<sup>129</sup> In that case, the California Supreme Court enforced a promissory note despite the plaintiff’s violation of a licensing statute.<sup>130</sup> The court there held that the licensing statute did not expressly prohibit enforcement of contracts made in violation of the statute:

The ordinance does not declare that a contract made by any one in the conduct of the various businesses for which licenses are provided to be procured under the ordinances, shall, if a license is not obtained, be invalid; nor is there any provision therein indicating in the slightest that this failure was intended to affect in any degree the right of contract.<sup>131</sup>

The *Marathon* court also looked to *Johnson v. Mattox*, in which a California appellate court upheld the severance of an unlicensed contractor’s construction contract made in violation of the California Business and Professions Code, which *specifically prohibited the enforcement of construction contracts of unlicensed contractors*.<sup>132</sup> The court allowed the contractor to recover for goods which were not related to

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125. *Id.*

126. *Marathon*, 140 Cal. App. 4th at 1009.

127. *Id.* (quoting *Lewis & Queen v. N.M. Ball Sons* 48 Cal. 2d 141, 151 (1957)).

128. *Id.* (quoting *Gatti v. Highland Park Builders*, 27 Cal. 2d 687, 690 (1946)).

129. *Id.* at 1010.

130. *See generally* *Wood v. Krepps*, 168 Cal. 382 (1914).

131. *Marathon*, 140 Cal. App. 4th at 1010 (quoting *Wood v. Krepps*, 168 Cal. 382, 387 (1914)).

132. *Johnson v. Mattox*, 257 Cal. App. 2d 714, 719 (Ct. App. 1968).



the illegal construction activities.<sup>133</sup>

Finally, the *Marathon* court explained that while *Waisbren v. Peppercorn Productions*, one of the seminal cases on personal managers and the TAA, could be taken as inconsistent with the holding in *Marathon*, it actually carries no weight with regard to severability.<sup>134</sup> The court made it clear that while some, including perhaps the Labor Commissioner, believe that *Waisbren* completely precludes severance of personal manager contracts if there is a single violation of the Act, this is incorrect.<sup>135</sup> *Waisbren* never discussed severability, and is thus “not authority for propositions not considered.”<sup>136</sup>

#### IV. ANALYSIS

In some circumstances, actors use the Talent Agencies Act as a sword to sever obligations they have incurred on their way to success. A classic example of this is *Park v. Deftones*, in which a band avoided paying commission to their manager for a legally procured recording contract because the manager booked gigs for them *without compensation*.<sup>137</sup> Although booking these shows was a relatively serious violation of the Act, it seems intuitively unfair that the band could use these violations to get out of their obligations. It was only when Park filed suit to collect his commission that objections were made to Park’s efforts, citing them in violation of the Act.<sup>138</sup>

The *Marathon* case is a similar example of an artist attempting to avoid paying commission due on an obligation (a contract for the “Strong Medicine” television series) that was *not* incurred in violation of the Act.<sup>139</sup> Indeed, after firing Marathon at the end of “Strong Medicine’s” second season, Blasi reaffirmed her intent to pay Marathon all monies owed to Marathon for its work with her on the series, then never paid the company another dollar.<sup>140</sup> When Marathon sued “to get paid for its labors,” Blasi responded by petitioning the Labor Commission to invalidate the

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133. *Id.*

134. *Marathon*, 140 Cal. App. 4th at 1013.

135. *Id.* at 1012–13.

136. *Id.* at 1013 (quoting *People v. Alvarez*, 27 Cal. 4th 1161, 1161 (2002)).

137. *Park v. Deftones*, 71 Cal. App. 4th 1465, 1467–68 (Ct. App. 1999).

138. See Edwin McPherson, *The Talent Agencies Act Is Alive, but Is It Well?*, 22 L.A. LAW., Dec. 1999, at 55.

139. See generally, *Marathon Entm’t, Inc. v. Blasi*, 140 Cal. App. 4th 1001 (Ct. App. 2006), petition for review granted, 2006 LEXIS 11453 (Cal. Sept. 20, 2006) (No. S145428).

140. Opening Brief for Appellant at 14, *Marathon Entm’t, Inc. v. Blasi*, No. S145428 (Cal. Oct. 20, 2006).

contract.<sup>141</sup> On January 30, 2004, the Labor Commission did just that, finding that *Marathon* had repeatedly procured employment for Blasi in violation of the Act.<sup>142</sup>

The Act was meant to protect artists from abuses at the hands of agencies and unlicensed agents. It was not created to allow artists to receive gratis services from managers who undertook to develop their careers when, in many cases, the artists did not make enough money for any agent to consider representing them.<sup>143</sup> The *Marathon* decision was thus a commendable move by the court to uphold the spirit of the TAA. However, while the *Marathon* decision was a step in the right direction, it is certainly not the end of this controversy. The decision faces strong opposition from powerful Hollywood forces.<sup>144</sup> Furthermore, it can be distinguished on its facts from much of the case law relied upon, and thus may not stand up to California Supreme Court review.

#### A. *Hollywood Opposition to the Decision*

The Screen Actor's Guild (SAG), the American Federation of Television and Radio Artists (AFTRA), the Association of Talent Agents (ATA), the Director's Guild of America (DGA), and Robert Jones, California's Labor Commissioner, are all vocal opponents of the decision.<sup>145</sup> These Hollywood players actively sought the depublishing of the *Marathon* ruling before the California Supreme Court granted appeal by writing separate letters to Supreme Court Chief Justice Ronald George.<sup>146</sup> Now that review has been granted, and the decision has indeed been depublished, these powerful groups continue to assert their influence, most recently as amici in support of Blasi.<sup>147</sup>

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141. *Id.* at 11.

142. *Id.* at 15.

143. See Devlin, *supra* note 14, at 386 ("The personal manager is often the artist's first representative because agents typically will not accommodate unknown talent or talent that is less in demand; managers are the only individuals in the business that are actually willing to procure employment for such artists."). See also McPherson, *supra* note 138, at 60 ("[I]t is not the artists but the agents who are being protected. In fact, in this case, the act is protecting the very agents who refused to represent the Deftones when Park was booking their performances because the band was not getting paid enough money to generate enough commissions for those agents.").

144. See Dave McNary, *Commissioner Backs Blasi*, DAILY VARIETY, Aug. 29, 2006, at 6. See also Leslie Simmons, *Industry Groups Choosing Sides Carefully in Blasi Commission Case*, THE HOLLYWOOD REP., ESQ., Sept. 18, 2006, [http://www.hollywoodreporteresq.com/thres/search/article\\_display.jsp?vnu\\_content\\_id=10031238](http://www.hollywoodreporteresq.com/thres/search/article_display.jsp?vnu_content_id=10031238) 69.

145. See McNary, *supra* note 144, at 6. See also Simmons, *supra* note 144.

146. Simmons, *supra* note 144.

147. See generally Brief for the Screen Actors Guild, et al. as Amici Curiae Supporting

The Labor Commissioner himself is perhaps the most vehement opponent. In his letter to the Supreme Court, he voiced his disagreement and urged the Court to take heed that the ruling would seriously complicate the task of the Labor Commission:

It is anticipated that if the decision in *Marathon Entertainment* remains published and controlling, the Talent Agent Controversies hearings will be more complicated and time consuming in that the issues surrounding the severability of the contract will have to be addressed and the determination of whether the illegal procurement activity tainted the entire contract before us. The other anticipated result is that the ability of the Act to regulate unlicensed talent agents will be greatly eroded.<sup>148</sup>

If the *Marathon* decision stands, it is not clear how the Commission will apply it to future controversies. While the Labor Commissioner would be forced to consider whether the doctrine of severability is applicable, there can be no assurance that it will be applied fairly. Here, the Commissioner has expressed his displeasure at how “complicated” and “time-consuming” it will be if he and his staff have to consider issues of severability.<sup>149</sup> Certainly such worries do not outweigh the overriding concerns of a fair and equitable result, or the fact that the doctrine of severability has been entrenched in California law since 1872.<sup>150</sup>

Moreover, the doctrine of severability allows for an out. If the Commissioner feels that the “taint of illegality so permeates the entire agreement that it cannot be removed by severance,”<sup>151</sup> he may still invalidate the entire agreement.<sup>152</sup> The Commissioner makes his feelings on severability clear through his letter to the California Supreme Court.

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Respondents at 1–2, *Marathon Entm’t, Inc. v. Blasi*, No. S145428 (Cal. Jan. 2007).

148. See McNary, *supra* note 144, at 6

149. *Id.* See also Brief for the Screen Actors Guild, et al. as Amici Curiae Supporting Respondents at 22, *Marathon Entm’t, Inc. v. Blasi*, No. S145428 (Jan. 26, 2007) (arguing that applying the doctrine of severability to the Talent Agencies Act creates “a nebulous standard that is unworkable.”); Opening Brief for Respondent at 6, *Marathon Entm’t, Inc. v. Blasi*, No. S145428 (Oct. 30, 2006) (arguing that applying the doctrine of severability on a case-by-case basis is “cumbersome.”).

150. CAL. CIV. CODE § 1599 (Deering 2006).

151. *Marathon Entm’t, Inc. v. Blasi*, 140 Cal. App. 4th 1001, 1010 (Ct. App. 2006), *petition for review granted*, 2006 LEXIS 11453 (Cal. Sept. 20, 2006) (No. S145428) (citing *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 659 (Ct. App. 2004)).

152. See Opening Brief of Respondent at 7, *Marathon Entm’t, Inc. v. Blasi*, No. S145428 (Cal. Oct. 30, 2006) (calling the Court of Appeals’ new standard of applying the doctrine of severability “standardless,” and asking, “What is the ‘taint’ of ‘illegality’ and when does it ‘permeate’?”).

Given the Labor Commission's history of construing the Act harshly against personal managers, it seems likely that the Commissioner would have little difficulty deciding that *any* procurement activity in violation of the Act taints the entire contract so as to make it un-severable. The Labor Commission has always had the authority to award a manager "some amount of compensation based on quantum meruit," but in most cases has declined to do so, preferring instead to invalidate the entire contract and divest the violator of both past and future earnings.<sup>153</sup> In addition, the Commission has often been accused of being strongly biased towards agents.<sup>154</sup> It is likely that the Commissioner would thus continue to side with these artists and agents. There are no guarantees that forcing him to consider the severability of a contract will stop artists from rescinding personal manager contracts, except perhaps in cases where the procurement was so slight as to blatantly invalidate any argument that the entire contract is tainted.

The National Conference of Personal Managers (NCOPM), a trade association of personal managers, recently took these very same concerns to Governor Schwarzenegger.<sup>155</sup> In a letter to the Governor, they alleged that the letter the Labor Commissioner wrote to the California Supreme Court was not only "biased" and "improper", but "illegal."<sup>156</sup> This is because Jones will still be involved in making decisions about the case if it is ultimately remanded to the Labor Commission. NCOPM noted that "[t]he California Government Code requires state agencies to act within constitutionally mandated limits in administering law and mandates a separation between administration and adjudication. . . . The commissioner's comments in his letter . . . were not made in an advisory position, but as an advocate in a case still before him."<sup>157</sup> Neither Jones nor Schwarzenegger were available for comment, so any effect the NCOPM

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153. Devlin, *supra* note 14, at 392. See also *Stroman v. New Wave Entm't*, TAC 38-05, at 6 (July 11, 2006), available at <http://www.dir.ca.gov/dlse/TAC/38-05.pdf>; *Behr v. Marv Dauer & Assoc.*, TAC 21-00, at 13 (Aug. 16, 2001), available at <http://www.dir.ca.gov/dlse/TAC/21-00.pdf>; *Kilcher v. Vainshtein*, TAC 02-99, at 28 (May 30, 2001), available at <http://www.dir.ca.gov/dlse/TAC/02-99.pdf>; *Church v. Brown*, TAC 52-92, at 14 (June 2, 1994), available at <http://www.dir.ca.gov/dlse/TAC/52-92.pdf>; Opening Brief of Respondent at 35-36, *Marathon Entm't, Inc. v. Blasi*, No. S145428 (Cal. Oct. 30, 2006) (providing an extensive list of instances in which the Labor Commission has invalidated entire contracts for any violations of the Act).

154. Kelli Shope, *The Final Cut: How SAG's Failed Negotiations with Talent Agents Left the Contractual Rights of Rank-and-File Actors on the Cutting Room Floor*, 26 J. NAALJ 123 (2006); see also McPherson, *supra* note 138, at 60.

155. Dave McNary, *Managers Go to Gov in Dispute*, DAILY VARIETY, Jan. 9, 2007, at 4.

156. *Id.*

157. *Id.*

letter may have remains to be seen.<sup>158</sup>

### B. *The Possibility of Reversal*

Perhaps even more important than the Commissioner's opposition, and other entertainment industry forces, is the very real chance that the California Supreme Court will not agree with the analysis and overrule the decision. First of all, the cases cited by the court can be distinguished from *Marathon*. Moreover, the appellate court only gave perfunctory treatment to the reasoning behind one of its recent decisions, *Yoo v. Robi*,<sup>159</sup> and to the possibility of the *Marathon* decision undermining the TAA itself.<sup>160</sup> It is almost certain that the Supreme Court will look more closely at these issues.

#### 1. Distinguishing the Cases Cited by the *Marathon* Court

The facts in *Birbrower* can easily be distinguished from *Marathon*. In *Birbrower*, the statute in question provided that "[n]o one may recover compensation for services as an attorney at law in this state unless [the person] was at the time the services were performed a member of The State Bar."<sup>161</sup> The court then went into a detailed discussion about what it meant to practice law "in this state."<sup>162</sup> It applied the statute to *Birbrower's* activities in California, and determined that the firm did indeed practice law "in this state," and had thus violated the statute.<sup>163</sup> However, the court went on to say that the statute *cannot regulate the practice of law in other states*, and that *Birbrower* may be able to receive compensation for its work in New York to the extent that it is possible to "sever the portions of the consideration attributable" to services rendered in New York.<sup>164</sup> Thus, the court applied the doctrine of severability because the scope of the California statute did not reach the events that took place in New York.<sup>165</sup>

The events in *Marathon* took place entirely within the state of California and were governed by the California Labor Code. *Birbrower*

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158. *Id.*

159. *Yoo v. Robi*, 126 Cal. App. 4th 1089 (Ct. App. 2005).

160. *See Marathon Entm't, Inc. v. Blasi*, 140 Cal. App. 4th 1001, 1012–13 (Ct. App. 2006), *petition for review granted*, 2006 LEXIS 11453 (Cal. Sept. 20, 2006) (No. S145428).

161. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127 (1998) (emphasis added).

162. *Id.* at 128–30.

163. *Id.* at 131.

164. *Id.* at 139–40.

165. *Id.* at 124 ("[W]e do not believe the Legislature intended section 6125 to apply to those services an out-of-state firm renders in its home state.").

presented a set of facts where all activities performed in California were illegal, and thus void, but all of *Birbrower*'s activities that were performed outside of California were beyond the reach of California law. Contrastingly, *Marathon* presents a set of facts where all activities took place in California, some legal and some potentially in violation of the statute. Thus, it was much easier to separate the legal acts from the illegal ones in *Birbrower*. More importantly, *Birbrower* did not present the complicated policy issues that *Marathon* does. In twenty-nine years of jurisprudence under the TAA, the courts and the Labor Commissioner have declined to apply the doctrine of severability to similar fact patterns.<sup>166</sup> For the court to make so radical a change in its approach to construing these contracts would require more than a comparison to *Birbrower*, with its very different set of facts. It would require an in-depth analysis of whether such a change in construction is in the interests of public policy, an analysis which the appellate court simply did not perform.

Furthermore, the other cases the court relied on to show that violations of business codes do not always mean a contract must be invalidated, can also be distinguished in an important way. All of the codes discussed in those cases were drafted very differently from the TAA.<sup>167</sup> All had criminal penalties (misdemeanors) for a violation.<sup>168</sup> Thus applying the doctrine of severability in those cases (for contractors, attorneys, etc.) does not lessen violators' incentive to comply with the statutes. Essentially, the defendants in those cases do not need the threat of total contract invalidation for violations because they already face the threat of criminal sanctions.

Notably, the *Marathon* court did not address the issue of deterrence in its decision.<sup>169</sup> Yet the *Waisbren* court did, noting that the CEC considered this very issue, and recommended that the legislature not re-enact criminal penalties because the "most effective weapon for assuring compliance with the Act is the power . . . to . . . declare any contract entered into between

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166. See *Yoo v. Robi*, 126 Cal. App. 4th 1089, 1103–04 (Ct. App. 2005).

167. See *Lewis & Queen v. N.M. Ball Sons*, 48 Cal. 2d 141, 147 (1957); *Gatti v Highland Park Builders*, 27 Cal. 2d 687, 688–89 (1946); *Wood v. Krepps*, 168 Cal. 382, 389 (1914); *Johnson v. Mattox*, 257 Cal. App. 2d 714, 717–18 (Ct. App. 1968) (citing to Bus. & Prof. Code §§ 7026–7059 as the applicable statutes (it is Bus. & Prof. Code § 7030 that provides a violation is a misdemeanor)); *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127 (1998).

168. See *Lewis & Queen*, 48 Cal. 2d 141, 147; *Gatti*, 27 Cal. 2d 687, 688–89; *Wood*, 168 Cal. 382, 389; *Johnson*, 257 Cal. App. 2d 714, 717–18 (citing to Bus. & Prof. Code §§ 7026–7059 as the applicable statutes (it is Bus. & Prof. Code § 7030 that provides a violation is a misdemeanor)); *Birbrower*, 17 Cal. 4th 119, 127.

169. *Marathon Entm't, Inc. v. Blasi*, 140 Cal. App. 4th 1001, 1013 (Ct. App. 2006), *petition for review granted*, 2006 LEXIS 11453 (Cal. Sept. 20, 2006) (No. S145428).

the parties void from the inception.”<sup>170</sup> In essence, the California legislature deliberately passed over criminal sanctions, and instead chose the threat of total contract invalidation as the sole method to deter violations of the TAA.<sup>171</sup> This means that applying the doctrine of severability to contracts in violation of the Act leaves violators with little to fear.<sup>172</sup> Arguably, many of the activities a manager performs that are in violation of the Act are not activities for which a manager expects payment. Rather, such activities are often in furtherance of the artist’s career, and thus in anticipation of *future* commissions on other contracts. Consider again the *Deftones* example, where the band’s manager booked performance engagements for the band.<sup>173</sup> The manager did not do so to receive a commission on the shows the band played.<sup>174</sup> Park asserted that he did so to increase the band’s popularity in order to get them a recording contract, a contract on which he should have received a commission.<sup>175</sup> If the only penalty for violation is that a manager will not get paid for his illegal procurement activities, activities he does not expect to be paid for anyway, what is left to deter him from violating the Act? As long as the manager ensures that the illegal acts remain distinct and severable, there is no threat of criminal sanction or contract invalidation for crossing the line from incidentally procuring employment to acting as an unlicensed agent.

## 2. What about *Yoo*?

Just as the *Waisbren* court dismissed as dicta the reasoning with which it did not agree in *Wachs*, so the *Marathon* court dismissed as dicta its reasoning in *Yoo v. Robi*.<sup>176</sup> In the February 2005 decision, a California

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170. *Waisbren v. Peppercorn Prod.* 41 Cal. App. 4th 246, 262 (Ct. App. 1995). See also REP. OF THE CAL. ENTM’T COMM’N, at 8, 15–18 (1986) (explaining that criminal sanctions had been removed from the Act in 1982, and considering whether to recommend reinstatement). See also Brief for the Screen Actors Guild, et al. as Amici Curiae Supporting Respondents at 6, *Marathon Entm’t v. Blasi*, No. S145428 (Cal. Jan. 26, 2007) (“One of the primary, and empirically most effective, enforcement mechanisms to ensure compliance with the Talent Agencies Act has been the administrative and judicial invalidation of contracts, in their entirety, based on the procurement of employment by unlicensed individuals in violation of the Talent Agencies Act. The possibility of losing all commissions, including those earned for services that do not fall within the Act’s regulatory scheme, is a tremendous disincentive to violating the Act.”).

171. See CAL. LAB. CODE § 1700.4 (Deering 2006).

172. See Brief for the Screen Actors Guild, et al. as Amici Curiae Supporting Respondents at 6–7, *Marathon Entm’t v. Blasi*, No. S145428 (Cal. Jan. 26, 2007).

173. *Park v. Deftones*, 71 Cal. App. 4th 1465, 1468 (Ct. App. 1999).

174. *Id.*

175. *Id.* at 1470.

176. *Marathon Entm’t, Inc. v. Blasi*, 140 Cal. App. 4th 1001, 1013 n.9 (Ct. App. 2006),

appellate court discussed severability and personal manager contracts for the first time.<sup>177</sup> But the *Marathon* court addressed *Yoo*, the only case to previously discuss severability with regard to manager contracts, only in a footnote, stating that:

[a]lthough *Yoo* broadly stated that “the public policy underlying the Act is best effectuated by denying all recovery, even for activities which did not require a talent agency license”, that statement is dicta because the trial court in *Yoo* had found that the main purpose of the agreement was illegal and the appellate court concluded, for factual reasons, that it was inappropriate to sever the agreement . . . Given that the doctrine of severance requires that each case be evaluated on its own merits, the mere fact that severance was denied in *Yoo* does not dictate the outcome of this case.<sup>178</sup>

The fact pattern in *Yoo v. Robi* should be somewhat familiar by now, as it echoes the previously discussed cases. Howard Wolf managed Paul Robi, a recording artist with the Platters for a period of years (Yoo was a successor in interest).<sup>179</sup> Wolf violated the Act numerous times by procuring employment for Robi.<sup>180</sup> Following Robi’s death, his widow licensed two albums using recordings Robi made with the Platters.<sup>181</sup> Wolf filed suit, alleging that he was due a ten percent commission on the albums under the contract.<sup>182</sup> Ultimately, the court stayed the action and the Labor Commissioner voided the contract for violations of the TAA.<sup>183</sup> On appeal, Wolf argued that the trial court should have applied the doctrine of severability to sever his illegal activities and allow him to receive his commission on his legal activities, i.e. the two albums in question.<sup>184</sup> The court flatly rejected this argument, relying on stare decisis and policy concerns.<sup>185</sup> The court noted that denial of compensation to managers for incidental procurement has been unanimous in case history.<sup>186</sup> Moreover, the court asserted that the policy behind the Act is to deter managers from engaging in illegal activity, and even posited that “one reason the

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*petition for review granted*, 2006 LEXIS 11453 (Cal. Sept. 20, 2006) (No. S145428).

177. *Yoo v. Robi*, 126 Cal. App. 4th 1089, 1089 (Ct. App. 2005).

178. *Marathon*, 140 Cal. App. 4th 1001, 1013 n.9.

179. *Yoo*, 126 Cal. App. 4th 1089, 1094.

180. *Id.* at 1105.

181. *Id.* at 1095.

182. *Id.*

183. *Id.*

184. *Id.* at 1102–03.

185. *Yoo*, 126 Cal. App. 4th at 1103–04.

186. *Id.* at 1104.



Legislature did not enact criminal penalties for violation of the Act was 'because the most effective weapon for assuring compliance with the Act is the power . . . to declare any contract entered into between the parties void from the inception.'"<sup>187</sup>

The *Marathon* court correctly noted that the statements regarding the doctrine of severability in *Yoo* are dicta. While the court seemed to say that public policy precludes application of the doctrine of severability, the actual holding of *Yoo* is simply that the trial court correctly entered judgment for Robi. However, the court did soften its stance on severability after the rather draconian statements about the deterrent power of possible total contract invalidation.<sup>188</sup> The court concluded that while California Civil Code section 1599 may "authorize[] a court to sever the illegal object of a contract from the legal it does not require the court to do so," and that "[t]he decision whether to sever the illegal term of a contract is informed by equitable considerations."<sup>189</sup> Thus, the *Yoo* decision does not entirely preclude application of the doctrine of severability, even though the court was diametrically opposed to applying it on policy grounds. The appellate court simply agreed with the trial court that in the Robi-Wolf situation the dilution of the deterrent effect on the Act is more serious or outweighs the inherent unfairness of Robi receiving an unbargained for benefit.<sup>190</sup> But the very fact that the *Marathon* court chose to ignore the reasoning behind this recent decision could be an issue on appeal, as it is likely that the Supreme Court will consider the policy issue discussed in *Yoo*.

### 3. Policy: Will the Act be Undermined?

It is this very issue, the incentive (or lack thereof) to comply with the Act, which the *Marathon* appellate court glossed over. While the court deemed it important enough to devote an entire section of its decision to—"The Availability of Severance Will Not Undermine the Act"<sup>191</sup>—it included no analysis at all. The court simply stated "[w]e believe that permitting the possible recovery of commissions on lawfully procured employment contracts but barring such recovery on illegally procured employment contracts will provide personal managers with ample financial

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187. *Id.* (quoting *Waisbren v. Peppercorn Prod.*, 41 Cal. App. 4th 246, 262 (Ct. App. 1995) (quoting from the 1985 CEC report)).

188. *Id.* at 1105.

189. *Id.*

190. *Id.*

191. *Marathon Entm't v Blasi*, 140 Cal. App. 4th 1001, 1012 (Ct. App. 2006), *petition for review granted*, 2006 LEXIS 11453 (Cal. Sept. 20, 2006) (No. S145428).

incentive to comply with the Act.”<sup>192</sup> As mentioned above, the legislature clearly disagreed with this statement, preferring to rely on the threat of total contract invalidation rather than criminal penalties.<sup>193</sup> As also discussed previously, the illegally procured employment contracts are not necessarily ones on which the manager expected to be paid at all.<sup>194</sup> Why, when policy issues come up in these cases again and again, would the appellate court give this issue such cursory treatment?

Perhaps the court reasoned that giving people an incentive to comply with the Act is a problem better left to the California legislature. Blasi’s attorneys allege that the court was simply substituting “its own notion of how best to prevent violations of the TAA . . . for the clear and rational reasoning of the Legislature.”<sup>195</sup> But as the court provided no analysis, it is impossible to determine its reasoning. Will the Supreme Court give these issues the same cursory treatment? Probably not. When the *Marathon* appellate court carefully reviewed the application of the doctrine of severability in prior case law, the most prevalent issue was one of fairness—are the interests of justice served by applying the doctrine? The *Marathon* court may have committed a serious error in not applying this to the facts at hand. It should have considered in detail whether applying the doctrine would serve the interests of justice, or, as the Labor Commissioner believes, undermine the Act. Certainly the Supreme Court will want to address this issue. Indeed, both *Marathon* and *Blasi* devote considerable time to the issue of policy in their briefs filed before the Court.<sup>196</sup>

In summary, the *Marathon* decision has a strong chance of being overruled by the California Supreme Court. It is distinguishable from most of the cases relied on by the appellate court, and does not address important policy issues. If it is overruled, personal managers are left in the same quandary of having contracts nullified because of minor violations of a licensing statute in which they are never even mentioned.<sup>197</sup> But, even if

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192. *Id.*

193. *Waisbren v. Peppercorn Prod., Inc.*, 41 Cal. App. 4th 246, 262 (Ct. App. 1995). *Contra* Answer Brief for Appellant at 26–33, *Marathon Entm’t v. Blasi*, No. S145428 (arguing that there is no support for the contention that it was the legislature’s clear intent to rely on total contract invalidation to deter violations of the TAA).

194. *See supra* p. 452.

195. Opening Brief for Respondent at 26, *Marathon Entm’t v. Blasi*, No. S145428 (Cal. Oct. 30, 2006).

196. *See* Answer Brief for Appellant at 33–35, *Marathon Entm’t v. Blasi*, No. S145428; Opening Brief for Respondent at 29–34, *Marathon Entm’t v. Blasi*, No. S145428 (Cal. Oct. 30, 2006).

197. *See* Brief for the National Conference of Personal Managers as Amicus Curiae Supporting Appellants at 4–6, *Marathon Entm’t v. Blasi*, No. S145428 (Cal. Jan. 2007); Opening Brief for Appellant at 17–33, *Marathon Entm’t v. Blasi*, No. S145428 (Cal. Oct. 20, 2006) (both

the decision is not overruled, personal managers may still find their contracts being voided. After all, the agency with original jurisdiction in all of these cases is headed by a man who is vehemently opposed to the decision.<sup>198</sup> As such, how will that agency apply the doctrine of severability? Even though the Labor Commission will be forced to consider the doctrine, no one can dictate exactly how it must be applied. How many and what type of violations will be considered severable? How many violations will be allowed before the Labor Commission considers the entire contract to be tainted with illegality and thus prone to complete invalidation?<sup>199</sup> Even if the law is settled, the interpretation will still be up in the air. It is an accepted principle of law that deference should be given to the agency in charge of administering a statute.<sup>200</sup> However, surely this does not mean that the legislature would wish that agency to create the standard entirely. Thus, a workable standard is needed.

## V. POSSIBLE SOLUTIONS

It has been twenty-five years since the California Legislature last reviewed the TAA. In 1982, it seemed that the call for reform was being answered when the "Legislature created the CEC to study the laws of California and other states relating to the licensing of agents . . . in the entertainment industry in order to recommend . . . a model bill regarding licensing."<sup>201</sup> Indeed, when the Legislature amended the Act in 1986, they followed the recommendations of the CEC.<sup>202</sup> And yet the controversies in the area of agent and manager regulation have persisted, and even grown, as evidenced by the sheer volume of academic discourse on the subject.

Moreover, this discourse is not limited to the issue of whether managers should be able to procure employment. Two other major issues, also in dire need of legislative attention, have dominated the public debate on agents and managers. The first is the controversy surrounding the fact that managers, unlike agents, have been able to act as producers.<sup>203</sup> Agents,

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arguing that because the legislature chose not to mention personal manager in the Act, they should be exempt from all regulation under the TAA).

198. See McNary, *supra* note 144, at 6. See also Simmons, *supra* note 144.

199. See Opening Brief for Respondent at 7–8, *Marathon Entm't v. Blasi*, No. S145428 (Cal. Oct. 30, 2006) (calling the court of appeals new standard of applying the doctrine of severability "standardless," and asking, "[w]hat is the 'taint' of illegality and when does it 'permeate'?").

200. *Waisbren v. Peppercorn Prod. Inc.*, 41 Cal. App. 4th 246, 255–56 (Ct. App. 1995).

201. *Park v. Deftones*, 71 Cal. App. 4th 1465, 1472 (Ct. App. 1999).

202. *Id.*

203. See generally William A. Birdthistle, *A Contested Ascendancy: Problems with*

because they have been subject to guild regulations, are prohibited from owning any “equity interest in a guild member,” which essentially “translates into a bar against agents producing the work of their clients.”<sup>204</sup> Managers, however, are not subject to guild regulation and so they may act as producers, which can result in major conflicts of interest.<sup>205</sup> For instance, how can a manager foster the artist’s needs if, as a producer, that manager is concerned with “limiting the outlays of production”?<sup>206</sup> This has even prompted some to advocate manager regulation rather than revisions to the TAA.<sup>207</sup>

The second issue is the failure of the Screen Actors Guild (SAG) and the Association of Talent Agents (ATA) to negotiate a revised collective bargaining agreement.<sup>208</sup> This issue is actually a result of the producer controversy discussed above. Due to agents’ dissatisfaction with the ban on owning equity interest in their clients under the old collective bargaining agreement, known as Rule 16(g), the ATA sat down with SAG in 1999 to negotiate a revised agreement.<sup>209</sup> These negotiations fell apart in 2002.<sup>210</sup> As a result, Rule 16(g) expired, neither organization has returned to the bargaining table, and agents are now regulated by a general services agreement (GSA) drafted by the ATA and approved by the Labor Commissioner.<sup>211</sup> Some feel that the GSA combined with the TAA is not protective enough of actors, and that the TAA should be reviewed and expanded as a result.<sup>212</sup>

In light of the fact that the confusion in the field of agent and manager regulation extends far beyond whether or not managers should be able to incidentally procure employment for their clients, it is time for the California legislature to take another look at the TAA. Specifically, the Act should be amended to reflect the rest of the body of California case law

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*Personal Managers Acting as Producers*, 20 LOY. L.A. L. REV. 493, 495–501 (2000) (providing a brief history of manager/agent regulation, an overview of the issues that arise when managers act as producers, and suggestions for reform in the form of guild regulation of managers).

204. *Id.* at 521.

205. *Id.* at 535–36 n.323.

206. *Id.* at 535.

207. *See id.* at 543–45 (2000) (detailing Assemblywoman Keuhl’s proposal regarding manager licensing); *see also* Heath B. Zarin, *The California Controversy Over Procuring Employment: A Case for the Personal Managers Act*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 927, 931–33 (1997).

208. *See generally* Shope, *supra* note 155 (discussing the failed SAG-ATA negotiations).

209. Shope, *supra* note 155, at 132–33.

210. *Id.* at 124.

211. *Id.* at 124, 132–39.

212. *Id.* at 153–54.

regarding contracts made in violation of licensing statutes.<sup>213</sup> That is, the legislature should re-introduce criminal penalties for violations, and enact an incidental procurement exception. This would allow managers the freedom to procure employment when it is incidental to the rest of their duties and beneficial to their clients, while still providing them with adequate incentives to comply with the Act.

Opponents to re-introducing criminal penalties for violations of the Act point to the fact that the CEC warned against reinstatement in 1982, and that the legislature heeded this warning in 1986.<sup>214</sup> However, the reasoning behind the CEC's recommendation was that criminal penalties were constitutionally questionable in light of the ambiguity inherent in the Act.<sup>215</sup> Specifically, the CEC found that the phrase "procure employment" was vague and unclear.<sup>216</sup> But if the legislature reviews the Act and creates a meaningful definition of what it means to procure employment these constitutional concerns become moot. One way to create a meaningful definition would be to define which types of procurement activities are necessary and incidental to the work of a personal manager.

Of course, detractors of an incidental procurement exception have also generally argued that any such an exception would be vague,<sup>217</sup> perhaps unconstitutionally so. As mentioned above, the *Waisbren* court refused to accept that the legislature meant to exempt personal managers from regulation unless "procurement efforts cross some nebulous threshold from 'incidental' to 'principal.'"<sup>218</sup> But the court went on to explain that it could not accept this because there was no rational basis provided by the Act for the court to do so.<sup>219</sup> Without direction from the legislature, the court is not in a position to decide when procurement is no longer incidental.<sup>220</sup> Therefore, while the court refused to read an exemption into the Act, it does not necessarily follow that the legislature could not create a

213. See generally *Lewis and Queen v. N.M. Ball Sons*, 48 Cal. 2d 141, 147 (1957); *Gatti v Highland Park Builders*, 27 Cal. 2d 687, 689 (1946); *Wood v. Krepps*, 168 Cal. 382, 389 (1914); *Johnson v. Mattox*, 257 Cal. App. 2d 714, 717 (Ct. App. 1968) (citing to Bus. & Prof. Code §§ 7026-7059 as the applicable statutes (it is Bus. & Prof. Code § 7030 that provides a violation is a misdemeanor)); and *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127 (1998) (all of which provide for criminal sanctions tempered by adequate exceptions).

214. Brief for the National Conference of Personal Managers as Amicus Curiae Supporting Appellants at 2, *Marathon Entm't v. Blasi*, No. S145428 (Cal. Jan. 2007).

215. REP. OF THE CAL. ENTMT COMM'N, at 15-16 (1985).

216. *Id.* at 16 (1985).

217. *Waisbren v. Peppercorn Prod., Inc.*, 41 Cal. App. 4th 246, 255 (Ct. App. 1995).

218. *Id.*

219. *Id.* at 262.

220. *Id.*

workable exemption. Even members of the Labor Commission itself have expressed a desire for reform.<sup>221</sup> David Gurley, Labor Commission attorney, noted in at least two cases, his displeasure with the draconian application of the Act: “Until case law or the legislature redirects the Labor Commissioner in carrying out our enforcement responsibilities of the Act, we are obligated to follow this path.”<sup>222</sup>

Potential drafters would do well to look at New York’s equivalent to the Act, and subsequent case law, in this area. The New York statute takes a common sense approach to the realities of a manager’s duties:

“Theatrical employment agency” means any person . . . who procures or attempts to procure employment or engagements for circus, vaudeville, the variety field, the legitimate theater, motion pictures, radio, television, phonograph recordings, transcriptions, opera, concert, ballet, modeling or other entertainments or exhibitions or performances, but such term does not include the business of managing such entertainments, exhibitions or performances, or the artists or attractions constituting the same, *where such business only incidentally involves the seeking of employment therefor*.<sup>223</sup>

And while California courts have lamented the difficulty of applying an incidental procurement exception,<sup>224</sup> the New York courts have experienced little difficulty applying such an exception.<sup>225</sup> Notably, the New York statute also includes criminal penalties for violations.<sup>226</sup>

However, the California legislature may need to go one step further than the New York statute. After all, California has a history of case law confusion in this area. Moreover, there are likely to be concerns about

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221. Opening Brief for Appellant at 12, *Marathon Entm’t v. Blasi*, No. S145428 (Cal. Oct. 20, 2006).

222. *Id.*

223. N.Y. GEN. BUS. LAW § 171 (Consol. 2006) (emphasis added); *see also* Zarin, *supra* note 207, at 965–66 (explaining that “[t]he incidental booking exception applies only to representatives who function primarily as personal managers for their artist-clients”).

224. *See generally* *Waisbren v. Peppercorn Prod., Inc.*, 41 Cal. App. 4th 246 (Ct. App. 1995).

225. *See* Zarin, *supra* note 207, at 966–69 (discussing *Mandel v. Liebman*, 100 N.E.2d 149 (N.Y. 1951), in which the court stated “that the issue of whether an unlicensed personal manager violated New York’s licensing requirements was a question of fact for the jury,” and also discussing *Friedkin v. Harry Walker*, 395 N.Y.S.2d 611 (Civ. Ct. 1977), in which the court declared the exception did not apply where the defendant was not acting as the plaintiff’s personal manager, thus demonstrating “the criteria that must be satisfied in order for the incidental booking exception to apply to an individual,” and providing, in footnote 247, a list of six other New York cases applying the exception).

226. *See id.* at 967.

enacting a constitutionally vague statute which does not provide potential violators with enough direction to know what type of procurement is incidental and when they have crossed the line into acting as an unlicensed agent.<sup>227</sup> One course of action would be to create a non-exclusive, illustrative list of examples of situations in which it is acceptable for a manager to procure employment for his client. For example, personal managers of musical acts might be able to book performance engagements for their artists, but only in small venues, and only if they neither request nor receive commissions on those engagements. By creating exceptions like this one, artists are given more opportunities to succeed in their field—protection of the artist *is* the ultimate goal of the TAA—and managers are given set guidelines for how to foster their clients' careers without crossing the line into acting as unlicensed talent agents.<sup>228</sup>

## VI. CONCLUSION

There is a very good chance the *Marathon* decision will be overturned by the California Supreme Court. Much of the case law relied upon by the appellate court can be distinguished by the differences between the business licensing statutes in those cases and the Talent Agencies Act. Moreover, the appellate court glossed over the *Yoo* precedent and the serious policy concerns inherent in applying the doctrine of severability to contracts that are made in violation of the TAA.<sup>229</sup> Even if the California Supreme Court allows the decision to stand, there is no guarantee that the Labor Commissioner will apply the doctrine fairly. And so the controversies in the field of agent and manager regulation continue. Attorneys and academics have been calling for reform for years.<sup>230</sup> In 1979, attorneys Neville Johnson and Daniel Webb Lang noted that “[f]or over twenty-five years, the personal manager operating in the California entertainment industry has been in the throes of a controversy, the specific issues of the dispute being whether and when personal managers need a

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227. See, e.g., Waisbren, 41 Cal. App. 4th 246, 255.

228. *Contra* REP. OF THE CAL. ENTMT COMM'N, at 10–11 (1985) (considering and rejecting exceptions to the Act, for example allowing “the personal manager to engage in ‘casual conversations’ concerning the suitability of an artist for a role or part,” or allowing the artist to “call a personal manager into the negotiations of an employment contract”).

229. *Marathon Entm't v. Blasi*, 140 Cal. App. 4th 1001, 1013 n.9 (Ct. App. 2006), *petition for review granted*, 2006 LEXIS 11453 (Cal. Sept. 20, 2006) (No. S145428).

230. See e.g., Shope, *supra* note 155; James O'Brien, *Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 CAL. L. REV. 471, 509 (1992) (calling for an incidental procurement exception for attorneys); McPherson, *supra* note 138, at 60 (calling for a new commission to review the Act in the wake of the intuitively unfair *Deftones* decision).

California state license to procure employment for professional entertainers.”<sup>231</sup> Change the “twenty-five” to “fifty,” and this statement still rings true. It is time again for review, and for meaningful change.

*Tracie Parry-Bowers\**

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231. Johnson & Lang, *supra* note 10, at 375.

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